Supreme Court, U. S.
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IN THE

Supreme Court of the United States

October Term, 1975

No. 75-4701

THOMAS THORNBURG, *Petitioner,*

vs.

UNITED STATES OF AMERICA, *Respondent.*

Petition for Writ of Certiorari to the United States Court of Appeals for the First Circuit.

RICHARD A. GROSSMAN,
10880 Wilshire Boulevard,
Nineteenth Floor,
Los Angeles, Calif. 90024,
(213) 475-6722,
Attorney for Petitioner.

Parker & Son, Inc., Law Printers, Los Angeles. Phone 724-6622

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UNITED STATES OF AMERICA, *Respondent.*

Petition for Writ of Certiorari to the United States Court of Appeals for the First Circuit.

Petitioner prays that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the First Circuit in the case of *United States v. Thomas Thornburg, et al.,* decided on July 22, 1975.

Opinion Below.

The opinion of the United States Court of Appeals for the First Circuit is unpublished. A copy of this opinion is filed herewith as Appendix "A."

Jurisdiction.

The judgment and opinion of the United States Court of Appeals for the First Circuit was entered on July 22, 1975. On August 21, 1975, the Honorable William J. Brennan, Jr., Associate Justice of the Supreme Court of the United States and Circuit Justice for the First Circuit, by order, extended the time to file Petition for Writ of Certiorari up to and including September 20, 1975. A copy of the order extending time

to file Petition for Writ of Certiorari is attached hereto as Appendix "B". The jurisdiction of this Court is invoked under the provisions of 28 U.S.C. § 1254(1) and United States Supreme Court Rule 28 U.S.C. Misc. Rules 22(2).

Questions Presented.

1. Whether Petitioner was deprived of due process of law under the Fifth Amendment and the right to an impartial jury under the Sixth Amendment of the United States Constitution where at least one and possibly four members of the jury did not have sufficient understanding of the English language.

2. Whether Petitioner was denied due process of law under the Fifth Amendment of the United States Constitution where the court refused to give a requested alibi jury instruction which clearly set forth that the government's burden of proof covers the defense of alibi, as well as all other elements of the case where Petitioner offered proof of alibi to establish that he was not present at a particular time and place.

Constitutional Provisions.

Constitution of the United States, Amendment V:

> "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

Constitution of the United States, Amendment VI:

> "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence."

Statement of the Case.

On December 13, 1972, Petitioner was charged in a four-count indictment with conspiring to import, of importing, and of conspiring to possess a controlled substance—marijuana (21 U.S.C. §§ 960, 952(a)(2), 846) and for possession of marijuana (21 U.S.C. § 841). Petitioner was tried by jury in the United States District Court, District of Puerto Rico, before the Honorable Jose J. Toledo, Chief Judge. After a complex trial that lasted approximately seventeen days, Petitioner was found guilty on the first three counts of the indictment (21 U.S.C. §§ 960, 952(a)(2) and 846). Petitioner was found not guilty on count four (21 U.S.C. § 841). Clerk's Transcript, Vol. 1 page 18. On October 10, 1973, Petitioner was sentenced to federal prison for a period of five years on count one (1); three years on count two (2) and three years on count three (3). The sentences imposed on counts 2 and 3 were ordered to run concurrently; the sentence on count 1 was ordered to run consecutively. *Id.* at 77. On October 16, 1973, the court modified its previous sentence and ordered that, as required by statute, a special parole term of two (2) years be applied to counts 1, 2 and 3, each to run concurrently. *Id.* at 90.

On April 30, 1974, Petitioner was ordered released on bond pending appeal by the First Circuit. Petitioner has since that time been free on bond pending final disposition of this matter.

A. District Court Proceedings.

The trial of Petitioner consumed the better part of seventeen days. With the exception of translation from French to English by a duly qualified interpreter [R.T. Vol. 8, Sept. 10, 1973, pp. 26-36; R.T. Vol. 9, Sept. 10, 1973, p. 3], all testimony at trial was in English. Throughout the course of trial, approximately seventy (70) exhibits were offered in evidence. [*See* Index of Clerk's Transcript, pp. 7-12.] As the First Circuit has noted, the trial itself involved a complex record (*See* App. A at 2) covering an intricate conspiracy between Maurice Eme, Malcolm James, Roger Alluis[1] and Petitioner. [*See* App. A, pp. 2-14; R.T. Vols. 9-18.]

In the instant case, the government's chief and only prosecution witness to link Petitioner to the crimes charged was a Frenchman named Maurice Eme—a man from a highly questionable background, including activities in Volta, Casablanca and a prison term in Guadeloupe. (*See* App. A at 2.) Reduced to its essentials, Eme testified concerning Petitioner's connection and participation in the conspiracy as follows:

Eme testified that Alluis and Petitioner were at his bar restaurant in St. Martin during the morning of No-

[1]Defendant Alluis was tried with Petitioner before the same jury. Mr. Alluis has filed a separate Petition for Writ of Certiorari with this Court, No. 75-5311. Petitioner Alluis' counsel has not set forth the Sixth Amendment issue presented in the instant Petition because, as will be shown below, he could not have been aware of the existence of this issue at the time said Petition was filed. It is apparent, however, that the same fundamental infirmity which affected the verdict in Petitioner's case would have equal application for Petitioner Alluis.

vember 15. According to Eme, Petitioner told him he was going to Barranquilla, Colombia, to get a shipment of marijuana. [R.T. Vol. 9, Sept. 10, 1973 at 5.] Petitioner asked Eme to get a vessel to take a shipment to Puerto Rico. [*Id.* at 10.] Supposedly with permission of the owner's wife, Eme readied the Samanna, of which he was the caretaker. [*Id.*] Eme saw Petitioner again at 5 p.m. on November 17, in his restaurant. [*Id.* at 10.] Petitioner told him he had the marijuana and asked Eme whether the boat was ready and at what time he could leave. Eme told Petitioner he could leave around midnight. Shortly after midnight, Petitioner appeared in a red Toyota with the six suitcases of marijuana. These were transferred to the boat and Eme departed for Puerto Rico. [*Id.* at pp. 10-15.] Upon arriving in Puerto Rico, Eme testified that he tried to locate Roger Alluis, but as Eme was two days late, Alluis was not there. Eme testified that on the previous Friday, Petitioner had told him that Alluis was going to be waiting for him at Boca de Cangrejos to receive the marijuana; that Alluis was to pay him $5,000; and that Petitioner was to pay him a second $5,000 upon his return to St. Martin. [*Id.* Vol. 10, pp. 2 and 3.] After checking in at the La Rada on the twentieth, Eme tried to contact St. Martin to obtain Petitioner's address, but could not get it. [C.T. Vol. 9, p. 20, lines 17-25.]

Aside from the meetings on the fifteenth and seventeenth, Eme testified to meetings with Petitioner in St. Martin on November 5, 8, 10 and 13. [*Id.* p. 31, lines 10-12.]

Petitioner specifically denied any involvement in the alleged conspiracy or any other criminal activity, raised

the defense of alibi and denied meeting with Eme at any time from November 5 through 10, 1972 as well as other dates charged in the indictment. Petitioner presented documentary evidence[2] to establish that he was in New York at the Plaza Hotel from November 5 through November 8, 1972 and at a friend's house in New York until November 9, 1972, at which time he returned to Puerto Rico. Moreover, Petitioner introduced evidence to establish that on November 10, 1972, he was with his son shopping for shock absorbers and undergoing a medical examination in connection with his pilot's license. In addition, Petitioner produced other evidence to establish that he was not with Eme at the time the alleged conspiracy and the overt acts in connection therewith were being committed. In connection with this foregoing alibi defense, Petitioner requested an alibi instruction which would clearly set forth to the jury that the government's burden of proof covers the defense of alibi as well as all other elements of the case and that when a defendant asserts and offers proof of alibi, the burden does not shift to him to prove it. [*See* App. A, pp. 26-27; C.T. Vol. 16, pp. 110-113.] The trial court refused to charge the jury as requested. (*Id.*) In its charge, the trial court did instruct that the burden of proof was upon the prosecution "to prove beyond a reasonable doubt every essential element of the crime charged; the law never imposes upon a defendant in a criminal case the burden or duty of calling any witnesses or producing evidence." [C.T. 17th day of Trial, Sept. 27, 1973 at p. 22, lines 9-13.]

The jury not only listened to all testimonial and the vast majority of documentary evidence in English, but

[2]Clerk's Transcript, Vol. IV, pp. 1-19.

received its instructions in English. The record discloses that subsequent to its initial charge and after lengthy deliberation of over five hours [R.T. Vol. 16, p. 14, lines 9-12], the jury sent four messages to the court. These messages were written in Spanish. [*Id.* p. 114, lines 13-25; pp. 115-118, lines 1-9; C.T. Vol. 1, pp. 62-69; Court's Exhibits 1-7.] The trial judge's answers to the jury were written in Spanish. [R.T. Vol. 16 at pp. 121-123.] The trial court's translation of the Spanish communications between judge and jury are reproduced in Appendix E. The notes from the jury disclose that its members had specific questions with regard to evidence concerning the alibis of both Petitioner and co-defendant Alluis. The jury specifically wanted the court to tell the jury the whereabouts of Petitioner and co-defendant Alluis on November 3, 4 and 5, 1972, among other things. The jury also requested the court to supply it with the transcript of testimony of the government's chief witness, Eme, and that of Petitioner and co-defendant Alluis. [R.T. Vol. 16, pp. 115-117.] The jury also requested, in Spanish, a copy of the court's complete set of instructions or at least certain portions thereof concerning "corresponding parts to the different forms of possession." *Id.* p. 117, lines 2-5. In response to the jury's request for the testimony of Eme, Alluis and Petitioner, the trial judge informed the jury that the court could not deliver the transcripts to the jury according to law. The message further stated:

> "What the court can do is to read to you in open court, the statements . . . of Messrs. Eme, Thornburg and Alluis. *This nevertheless will take from two to three full days.* Please inform me if in view of this information you feel that it is required to do so. . . ." [*Id.* at p. 122, lines 23-25, p. 123, lines 1-5.] (Emphasis supplied.)

In response to this message, the jury notified the court that it would not be necessary to read the statements to the jury. [*Id.* at p. 119, lines 18-22.] The court did repeat to the jury its instructions as previously submitted. [R.T. Vol. 17.]

B. Jurors' Inability to Understand English.

It is now apparent that there was at least one and possibly as many as three jurors and one alternate juror who did not understand English.

The records of the jury clerk of the United States District Court for the District of Puerto Rico disclose the following.

Juror No. 1, Carmen M. Rivera Flores, was disqualified for jury service in the United States District Court for the District of Puerto Rico. That court's own records disclose that Ms. Rivera Flores was disqualified because she did not have sufficient knowledge of English. (*See* App. D.1.) Nevertheless, for some inexplicable reason not apparent from any records, Ms. Rivera Flores became a member of the jury that convicted Petitioner.

Juror No. 7, Maria Luisa Camacho, apparently understood English only "a little bit." This is disclosed by her answer to question No. 6 contained in the District Court's jury questionnaire:

> "6. Can you read, write, speak and understand the English language? Yes ☐ No ☐ (A little bit.)" (*See* App. D. 2.)

Juror No. 3, Tomas Rivera Santiago, responded "a little—not to (*sic*) much" to the foregoing question No. 6 in the jury questionnaire. (*See* App. D.3.)

Alternate juror, Fernando Lopez, answered "No" to question No. 6 and was subsequently disqualified by

the clerk for insufficient knowledge of English. (*See* App. D.4.)

In view of the court's own records, it is not known how these individuals found their way onto Petitioner's jury. It is clear, however, that at least one, and possibly as many as three jurors, and one alternate juror had insufficient knowledge of the English language to understand, follow, analyze and weigh the complex evidentiary material presented at trial.

As the Affidavit of Petitioner's counsel demonstrates, it was not until September 11, 1975 that the facts were discovered concerning this basic infirmity in the composition of the jury. (See App. C.) A thorough review of the present record on appeal in the instant case would not have led to such a discovery. Disclosure of these facts occurred as the result of an independent investigation of the District Court's jury records by Petitioner's counsel. (*Id.*) As such, the issue of the jurors' inability to understand English is raised for the first time in this Court.

C. Proceedings in Court of Appeals.

On July 22, 1975, the United States Court of Appeals for the First Circuit affirmed in part the judgment of the District Court. The Court of Appeals vacated Petitioner's sentences under the doctrine of *United States v. Honneus*, 508 F.2d 566 (1st Cir. 1974) and remanded the case to the District Court for resentencing upon either one of the conspiracy counts. The remaining conspiracy count was dismissed.

In its opinion, the First Circuit ruled:

> "We do not recognize any generalized rule requiring an alibi instruction of the type sought, so long as it remains entirely clear that the burden of proof remains at all times with the prosecution." (App. A.) [Citations omitted.]

REASONS FOR GRANTING THE WRIT.

I.

The Jury That Convicted Petitioner Was Composed of at Least One and Possibly as Many as Four Jurors Who Did Not Understand English. Petitioner's Rights to Due Process and a Fair and Impartial Jury Under the Constitution Were Thus Violated. Moreover, the Composition of the Jury so Far Departed From the Accepted and Usual Course of Judicial Proceedings as to Call for an Exercise of This Court's Power of Supervision.

It is apparent that the jury in Petitioner's trial below consisted of at least one and possibly as many as four persons who were unable to understand the English language. As the First Circuit has aptly noted, the trial involved a complex record, covering an intricate conspiracy to smuggle marijuana. The trial consumed the better part of seventeen days and involved numerous witnesses and the submission of extensive documentary evidence. The trial was conducted exclusively in the English language and the jury twice received its instructions from the court in English.

It is axiomatic that the basic constitutional right to a trial by jury encompasses the requirement that its members possess the ability and faculties to fully understand the evidence presented. As Mr. Justice Stewart stated in *Turner v. Lousiana*, 379 U.S. 466:

> "The requirement that a jury's verdict 'must be based upon the evidence developed at the trial' goes to the fundamental integrity of all that is embraced in the constitutional concept of trial by jury. 'The jury is an essential instrumentality—an appendage—of the court, the body ordained to pass upon guilt or innocence. Exercise of calm and informed judgment by its members is essential to proper enforcement of law.' *Sinclair v. United States*, 279 U.S. 749, 765, 73 L.Ed. 938, 946, 49 S.Ct. 471, 63 A.L.R. 1258. Mr. Justice Holmes stated no more than a truism when he observed that 'Any judge who has sat with juries knows that in spite of forms they are extremely likely to be impregnated by the environing atmosphere.' *Frank v. Mangum*, 237 U.S. 309, at 349, 59 L.Ed. 969, at 980, 35 S.Ct. 582 (dissenting opinion)."

The constitutional requirement that a jury's verdict be based upon the evidence is rendered a nullity where, as here, at least one and possibly more jurors did not possess the requisite ability to understand that evidence in the language presented at trial. The effect of such an infirmity in the basic jury composition is as pervasive a denial of due process and the Sixth Amendment right to a fair and impartial jury as are outside influences affecting the deliberating process. *See, e.g., Parker v. Gladden*, 385 U.S. 363 (1966); *Turner v. Louisiana, supra.*

It is apparent that in order to obtain a unamimous verdict in the instant case, those jurors not possessed of sufficient ability to understand the English language must have relied upon the multilingual skills of their fellow jurors in interpreting and weighing the evidence. It is also clear that in this process, these jurors relinquished their vital and indispensable role in independently evaluating the complex of facts presented at trial.

The assigned error here presented was neither raised in the District Court nor Court of Appeals since it was discovered by Petitioner's counsel only one week prior to the filing of this Petition. This Court does, however, have the power to "notice a plain error not presented."

Revised Rules of the Supreme Court of the United States, Rule 40(1)(d)(2). Only last term in *Rogers v. United States,* .... U.S. ...., 45 L.Ed.2d 1, 95 S.Ct. .... (1975), this Court noticed error, notwithstanding Petitioner's failure to raise the issue in the Court of Appeals or this Court, since it was concluded that

> ". . . the combined effect of the District Court's error was so fraught with potential prejudice as to require us to notice them . . . ." *Id.* at 45 L.Ed.2d at 7; see also *Silber v. United States,* 370 U.S. 717 (1962) and *Brotherhood of Carpenters v. United States,* 330 U.S. 395, 411-412 (1947).

It is submitted that the combined effect of the error which occurred in the present case is so fraught with clear and actual prejudice as to require this Court to take notice thereof and grant the relief requested.

A. There Is a Conflict Among the Courts of Appeals on the Question of Whether an Alibi Instruction Is Required Which Acquaints the Jury That the Government's Burden of Proof Covers the Defense of Alibi, as Well as All Other Elements of the Case.

In the present case, Petitioner offered proof of alibi that he was elsewhere during certain periods when the alleged conspiracy was taking place, contrary to the evidence produced by the government. Petitioner's request for an alibi instruction was denied by the trial court. This refusal to instruct on the issue of alibi was upheld by the First Circuit. In its opinion, the Court of Appeals ruled:

> "We do not recognize any generalized rule requiring an alibi instruction of the type sought, so long as it remains entirely clear that the burden of proof remains at all times with the prosecution." (App. A.) [Citations omitted.]

Both the D.C. Circuit (*Guthrie v. United States,* 207 F.2d 19 (D.C. Cir. 1953) and the Seventh Circuit (*United States v. Erlenbaugh,* 452 F.2d 967, 975 (7th Cir. 1971), *aff'd,* 409 U.S. 239 (1972) appear to be in agreement with the First Circuit on this issue.

Both the Third Circuit and the Eighth Circuit require an instruction to acquaint the jury with the law that the government's burden of proof covers the defense of alibi, as well as all other phases of the case. *United States v. Marcus,* 166 F.2d 497, 503-504 (3d Cir. 1948); *United States v. Booz,* 451 F.2d 719 (3d Cir. 1971); *Johnson v. Bennett,* 414 F.2d 50 (8th Cir. 1969) (*en banc*) and *Stump v. Bennet,* 398 F.2d 111 (8th Cir.) *cert. den.,* 395 U.S. 1001 (1968).

In *Marcus,* op. cit. at 166 F.2d 497, 503-504, the Third Circuit recognized the weight of authority in requiring an alibi instruction.

> *"By the weight of authority it is held that the instructions on the presumption of innocence of the accused, and of the necessity of fastening every necessary element of the crime charged upon the accused beyond a reasonable doubt, are not enough in cases involving the necessary presence of the accused at a particular time and place, when the accused produces testimony that he was elsewhere at the time. If the accused requests an instruction as to the burden of proof on his alibi, an instruction on the subject must be given so as to acquaint the jury with the law that the government's burden of proof covers the defense of alibi,*

as well as all other phases of the case. Proof beyond a reasonable doubt as to the alibi never shifts to the accused who offers it, and if the jury's consideration of the alibi testimony leaves in the jury's mind a reasonable doubt as to the presence of the accused, then the government has not proved the guilt of the accused beyond a reasonable doubt. . . ." [Emphasis supplied.]

It is submitted that this is the better reasoned rule and would comport with the basic presumption of innocence which inures to the benefit of every defendant. Moreover, in view of the importance of this issue in the administration of criminal justice in the Federal Courts, this Court should exercise its power of supervision and resolve the conflict among the circuits.

B. Whether an Accused Is Entitled to an Alibi Instruction, as Requested, Under the Fifth Amendment Is an Important Question of Constitutional Law Which Calls for an Exercise of This Court's Power of Supervision.

In refusing to grant an alibi instruction as here requested, a court may well shift the burden of proof on a defendant. Such a practice has obvious constitutional significance. *See Mullaney v. Wilbur,* .... U.S. ...., 44 L.Ed.2d 508 (1975); *In re Winship,* 397 U.S. 358 (1970). As this Court stated in *Speiser v. Randall,* 357 U.S. 513, at 525-526 (1958):

> "Due process commands that no man shall lose his liberty unless the Government has borne the burden of . . . convincing the factfinder of his guilt."

As Mr. Justice Brennan observed in *In re Winship,* op. cit. 397 U.S. 364:

> "To this end, the reasonable doubt standard is indispensable, for it 'impresses on the trier of fact the necessity of reaching a subjective state of certitude on the facts in issue'." [Citations omitted.]

In *Winship,* this Court explicitly held that the Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged. *Id.* at 397 U.S. 364. Moreover, this Court has consistently held that any procedure which shifts the burden of proof to the accused is constitutionally offensive. See *e.g. In re Winship* and *Mullaney v. Wilbur,* 44 L.Ed.2d 508 (1975). Both the Third and Eighth Circuits have recognized that failure to specifically instruct the jury that the Government's burden of proof covers the defense of alibi may in fact shift that burden to a defendant. As observed by the Third Circuit in *United States v. Booz,* 451 F.2d 719 (3d Cir. 1971):

> ". . . A defendant is entitled to specific instructions on the burden of proof on alibi issues because the jury is likely to become confused about the burden of proof when an appellant offers this type of evidence. When affirmative proof, best known by the defendant himself, is offered, a likelihood exists that jurors would look to that proof for persuasion of its truth. But the correct approach is that such proof need only raise a reasonable doubt in the jurors' minds as to whether defendant was present at the scene. . . ."

In the instant case, the trial court's refusal to instruct the jury that the government's burden of proof encompasses the defense of alibi shifted the burden of proof to petitioner. In view of the jury's apparent interest and concern with the whereabouts of petitioner and his defense of alibi, such refusal was obviously prejudicial. Such a practice has been condemned by the Court and runs directly counter to the express holdings in *Winship* and *Mullaney*.

In view of the important constitutional question herein presented, the Court should grant the instant petition and resolve the apparent conflict between prior decisions such as *Mullaney* and *In re Winship* and that of the First Circuit in the case at bench.

Conclusion.

For the foregoing reasons, the instant Petition for Writ of Certiorari should be granted.

September 20, 1975.

Respectfully submitted,

RICHARD A. GROSSMAN,
Attorney for Petitioner.

APPENDIX A.

Opinion of the United States Court of Appeals for the First Circuit.

United States Court of Appeals, For the First Circuit.

United States of America, Appellee, v. Thomas Thornburg, Defendant, Appellant. No. 73-1395.

United States of America, Appellee, v. Roger Alluis, Defendant, Appellant. No. 73-1396.

Appeals from the United States District Court for the District of Puerto Rico. (Jose V. Toledo, Chief Judge, U.S. District Court).

Before Aldrich, McEntee and Campbell, Circuit Judges.

Gerardo Ortiz del Rivero for appellant Roger Allius.

Benicio Sanchez Rivera, by appointment of the court, for appellant, Thomas Thornburg. *Thomas Thornburg,* pro se on supplemental brief.

Jorge Rios Torres, Assistant United States Attorney, with whom *Julio Morales Sanchez,* United States Attorney, was on briefs, for appellee. July 22, 1975

CAMPBELL, *Circuit Judge.* After a jury trial, Thomas Thornburg and Roger Alluis were convicted of conspiring to import, of importing and of conspiring to possess a controlled substance, marijuana. 21 U.S.C. §§ 960, 952(a)(2), and 846. Each was acquitted on a fourth count charging possession of marijuana. 21 U.S.C. § 841. The offenses all arose from Thornburg's and Alluis' alleged connection with a scheme to ship a load of marijuana by speedboat from St. Martin, French West Indies, to Puerto Rico.

I

As both defendants challenge the sufficiency of the evidence, we have reviewed the complex record with care, having in mind the doubtful character of Eme, the government's chief witness, and Alluis' and Thornburg's insistence upon their innocence. We outline the evidence in some detail:

On November 19, 1972, a special U.S. customs agent, Calderon, received a tip from an individual passing through the San Juan International Airport that a 28 foot racing speedboat, Samanna, had been stolen in St. Martin at 2 a.m., November 17, 1972, supposedly by a Frenchman and an American. It was rumored that the boat was to pick up narcotics at St. Kitts and proceed to Puerto Rico.

Calderon posted a lookout, and on the afternoon of November 21 observed Samanna enter the Condado Lagoon, San Juan, where it docked. A white man and a black man were on board. They went quickly ashore, and for the remainder of the afternoon and throughout the night, the agents kept the vessel under surveillance. When the white man returned during the early hours of November 22, he was apprehended. A package of marijuana and several keys were removed from his person. Upon opening Samanna's cabin with the keys, the agents found six suitcases filled with marijuana. A tag on one of the suitcases read "Roger Alluis".

The arrested man turned out to be Marcell Daniel Maurice Eme, a Frenchman who ran a floating bar and restaurant in Marigot on St. Martin.[1] Eme told the agents that he and his companion, Malcolm James, had

[1]Eme's history includes activities in High Volta and Casablanca and a prison term in Guadeloupe.

departed St. Martin on Samanna early Saturday, November 18, with instructions from an unidentified person to deliver the six suitcases at 8 a.m. on the same day at the pier in the Condado Lagoon. Eme said they ran out of gasoline twenty miles west of St. Thomas, drifted until Monday, November 20, and on that day were towed by a fishing vessel to Boca de Cangrejos Yacht Club near San Juan, Puerto Rico. After refueling Samanna, Eme and James took a taxi into San Juan, where they registered at the Hotel La Rada. James spoke on the telephone to a friend in St. Martin known as Francoise in an unsuccessful effort to obtain money. On the twenty-first they moved the boat to the Condado Lagoon, and after so doing wandered about searching vainly for the person to whom they were to deliver the marijuana. Eme said he lost track of James, and at the time of his arrest had just taken some of the marijuana from one of the suitcases so as to sell it to obtain money.

Eme's tale caused the agents to go immediately to the Hotel La Rada. It was then 4 a.m. of the twenty-second. At the front desk they found a handwritten note for Eme and James reading,

> "Daniel [Eme crossed out]: Please meet me here at 8: AM tomorrow morning (La Rada—in lobby) or leave word where I can meet you.
>
> Roger."

Soliciting Eme's cooperation the agents decided to stage a controlled rendezvous. Eme was escorted to the room in the La Rada he had been occupying; the agents stationed themselves nearby: and it was arranged to refer "Roger", when he appeared, to Eme's room. At about

7:30 a.m. the defendant Roger Alluis appeared at the Hotel, inquired for Eme, and was directed to the room. He knocked. Eme opened the door. According to one of the witnessing agents and to Eme himself, Eme made a cautionary signal with his hand. Alluis then said something to the effect he had the wrong room, and started to walk away, whereupon he was arrested and interrogated.

Alluis conceded to the agents that he had written the note, but denied that his meeting with Eme had anything to do with marijuana. Alluis told the following story: he was a government land reform advisor on leave from duties in Vietnam. He was visiting Thomas W. Thornburg, a friend from law school days who had invited him to spend his vacation on a Caribbean fishing trip. When Thornburg's 32 foot fishing boat, Sun Islander, was stolen in early November from its berth in St. Martin, Alluis had joined in the search. Police authorities throughout the Caribbean were alerted, and Alluis went to Colombia on November 9 to look for the boat. It was the search for the boat that had led him to seek out Eme whom he did not know personally, but whose name and hotel address were furnished by a person in St. Martin as someone who might know about the missing boat. Alluis said the suitcase tagged with his name was last seen by him on the Sun Islander before her theft. He had left all his luggage on board during a spell of very bad weather which had halted the fishing and caused Thornburg and him to leave St. Martin and fly to Puerto Rico by commercial air. Alluis was not carrying any quantity of money when arrested. He had an official passport, and a Colombia tourist card which reflected

the recent visit to that country. Eme said he had never seen Alluis before and that he was not the person to whom he was to deliver the marijuana.

Alluis was released. Before leaving he was allowed to speak to Eme privately, ostensibly about efforts to find the Sun Islander, and was seen to pat Eme on the back in a friendly manner.

The room clerk on duty at the La Rada verified that Eme and James had checked in on November 20. He testified that at about 6 or 6:30 the following evening, while Eme and James were out, he had been approached by Roger Alluis, who had said he was looking for Mr. Daniel Eme. Upon being told Eme was out, Alluis waited for about an hour, left to go eat, and then returned. A phone call came in for Eme from St. Martin at around 8 or 8:30 p.m. The clerk permitted Alluis to answer it, and Alluis spoke on the phone in some language other than Spanish or English (the jury could have inferred French) for three or four minutes. A short while later Alluis answered another call for Eme from St. Martin. Alluis finally left at about 11 p.m. after writing out the note for Eme that the agents later intercepted and paying the room clerk $10 to deliver it.

After the customs agents released Alluis, they interrogated Eme on four or five occasions, in the presence of his lawyer. During this period, Eme denied knowing Alluis and did not identify Thornburg. But on about December 8, 1972, when shown a photograph spread containing six pictures, one of which was of Thornburg, Eme selected the correct one as portraying "Tom Thornburg". He told the agents then that he knew both Alluis and Thornburg, that the latter had provided

the marijuana, and that it was to be delivered to Alluis in San Juan. Alluis and Thornburg were indicted soon thereafter, and Eme pleaded guilty. Although the Government recommended even greater leniency, he was sentenced to three years in prison before Alluis and Thornburg were tried. At their trial, Eme was the Government's chief witness.[2]

Eme testified that Alluis and Thornburg were in his bar restaurant in St. Martin during the morning of November 15. According to Eme, Thornburg told him he was going to Barranquilla, Colombia, to get a shipment of marijuana. Thornburg asked Eme to get a vessel to take a shipment to Puerto Rico. Supposedly with permission of the owner's wife, Eme readied the Samanna, of which he was the caretaker. Eme saw Thornburg again at 5 p.m. on November 17, in his restaurant. Thornburg told him he had the marijuana and asked Eme whether the boat was ready and at what time he could leave. Eme told Thornburg he could leave around midnight. Shortly after midnight, Thornburg appeared in a red Toyota with the six suitcases of marijuana. These were transferred to the boat and Eme, with James to help him, departed for Puerto Rico. Eme's version of events thereafter generally resembled what he had told the agents when they arrested him. The Samanna, he said, ran out of gas 15 miles beyond St. Thomas. He used the canvas cover of the boat as a sail and was pushed by the easterly trades towards Puerto Rico. Arriving off Boca de Cangrejos he was towed in by a fishing boat. (Eme was unable to furnish the names of the boat that towed him, its captain, or the manager of Boca de Cangrejos who allowed him

[2]Appellants assert that after they were convicted, Eme's sentence was reduced to 15 months and he was released.

to land.) Upon arriving, Eme testified that he tried to locate Roger Alluis, but as Eme was two days late, Alluis was not there. Eme testified that on the previous Friday, Thornburg had told him that Alluis was going to be waiting for him at Boca de Cangrejos to receive the marijuana; that Alluis was to pay him $5,000; and that Thornburg was to pay him a second $5,000 upon his return to St. Martin. After checking in at the La Rada on the twentieth, Eme tried to contact St. Martin to obtain Thornburg's address, but could not get it.

Besides the meetings on the fifteenth and seventeenth, Eme testified to meetings with Thornburg in St. Martin on November 5, 8, 10 and 13. On the fifth or sixth, Thornburg allegedly gave him a skin diver's knife later found in his possession. Eme said he first met Alluis, in the company of Thornburg, in his restaurant between the fourth and sixth of November, in the late morning. He next saw him around 9 a.m., November 10 or thereabouts, at the same place, in the company of Thornburg. At this time he gave back to them four suitcases they had given him for safekeeping several days earlier. On November 13, Thornburg gave him $1200 for having "well kept" the suitcases.

Eme described the distance from St. Martin to Puerto Rico as 200 miles, and the Samanna as capable of a maximum speed of 48 knots. He thought he could make the trip in 5 or 6 hours. He denied picking up the marijuana in St. Kitts. Thornburg's boat, Sun Islander, had arrived in St. Martin, in front of his restaurant, around the twenty-fourth or twenty-fifth of October, and he last saw it the second or third of November. It was about two days after the boat disappeared that Thornburg asked him if he knew where it was. The Government also called as its witness An-

tilda Reyes, proprietor of the Isla Grande Flying School in San Juan. She testified to renting a Cherokee 6 airplane to Thornburg for $1,000 in cash. She met Thornburg with respect to renting the plane on November 11, 1972. The rental period was for 10 days. Thornburg actually taking it on November 15. Thornburg told her he wanted the plane to search for a stolen boat belonging to him. While she had a high wing Cessna immediately available which permitted greater range of vision, Thornburg preferred to wait for the Cherokee, a low wing plane, with greater carrying capacity.

Both Alluis and Thornburg took the stand in their defense. Both told much the same story—of being close friends who cooperated to search for the lost Sun Islander during the period that, according to Eme, they were engaged in smuggling. Their testimony included the following:

The two defendants met in 1964 while students at the University of San Diego Law School. Alluis resided rent free in an apartment owned by Thornburg, who was considerably older, having served as an airborne officer in World War II. Alluis was obliged to leave law school after the first year for an infraction of rules, going on to graduate work and government service. They stayed in touch. In late 1969 Thornburg moved with his family from California to St. Thomas. When business plans failed to take root, he moved to Puerto Rico where he was residing during the events in question. Alluis and his wife honeymooned with the Thornburgs in St. Thomas early in 1970. From 1970 through 1972 Alluis worked in Vietnam, his stay interrupted by medical leave in mid-1971 and another leave commencing in August 1972. It was during this second

leave that Alluis, leaving his wife in the States, came to Puerto Rico on October 13, 1972, ostensibly to go fishing with Thornburg.[3]

There seems to have been little fishing. Alluis stayed at Thornburg's house in Rio Piedras but inexplicably travelled, according to stamps on his passport, in and out of Curacao between October 19-20, Venezuela between October 24-25, and Colombia between October 25-27. Thornburg himself was in St. Thomas from the twenty-third to twenty-seventh. Thornburg testified that during this time Alluis was exploring possible job opportunities. Alluis testified only to his enthusiasm for fishing. His hopes in this regard were pinned on the Sun Islander, a sports fisherman owned by Thornburg which had been entrusted to one Vargas, a captain in Thornburg's employ. Though sometimes chartered to others, the boat was to be available by the end of October.

On October 27, Thornburg, his wife, and Alluis travelled to St. Martin, there to board the Sun Islander. Alluis testified that Thornburg told him the boat had been undergoing repairs at St. Thomas, having earlier been run on a reef. According to Thornburg, the boat had been regularly berthed at St. Martin (and, indeed, was seen in Marigot, on the French side, as recently as October 27 in the vicinity of Eme's floating bar and restaurant). In any event, Vargas and the boat were not in St. Martin when they arrived, and Thornburg ascertained that she was instead in Fajardo, Puerto Rico. He asked Alluis to go to Farjardo and see to it that Vargas came on to St. Martin. On October

[3]Alluis testified that shortly before going to Puerto Rico, he had received a visit from Thornburg at Syracuse University where Alluis briefly attended a management course.

28, Alluis flew to Puerto Rico from St. Martin, finally reaching Fajardo late in the day. He found the Sun Islander and, eventually, Vargas at the marina in front of the Conquistador Hotel. Early the twenty-ninth Alluis and Vargas set off for St. Martin, but Alluis left the boat at St. Thomas because of sea sickness. Alluis testified that his suitcase—later to be found on Samanna stuffed with marijuana—remained on board. Vargas promised to follow along to St. Martin right away, and Alluis returned to St. Martin by air. However, Vargas and Sun Islander never showed up in St. Martin.

Government records introduced at trial confirm that in the period from October 31 to November 3, Thornburg and Alluis notified the Coast Guard and the F.B.I. in no uncertain terms that the Sun Islander was overdue, missing and probably stolen by its captain. The records reflect mention of Alluis' trip to Farjardo and his incomplete voyage to St. Martin with Captain Vargas and also the owner's suspicion that Vargas was privately engaged in smuggling liquor and similar operations. Vargas was suspected of having connections in Santo Domingo. The records reflect the owner's request for Vargas' arrest, if possible.

Both Alluis and Thornburg undertook at the trial to account for their time in November, so as to disprove Eme's assertions of meetings in St. Martin between early November and November 17.

Alluis testified that he was in St. Martin at times during November 3 and 4, as well as earlier, assisting Thornburg hunt for the boat. However, he testified that on November 5, he flew to Colombia from Puerto Rico via Venezuela, and that he remained in Colombia continuously until early November 17, except for a

trip to Curacao on November 12-13 to meet Thornburg. Alluis' official passport was introduced in evidence, and he relied upon entry and exit stamps therein to verify that he went to Columbia and stayed there. He testified that he resided in Colombia at the home of an individual named Harry Peak who was knowledgeable about boats. Peak allegedly reported on November 10 that a boat like Sun Islander had turned up in a remote area of Colombia. Alluis reported this to Thornburg, who came to Curacao on the thirteenth where they met. After unsuccessfully trying to rent a search plane in Curacao, Thornburg headed back to Puerto Rico, telling Alluis to remain in Colombia and await his return. Alluis accordingly returned to Cartagena. On November 17 Thornburg finally arrived in Cartagena, flying a Cherokee 6 rented several days earlier from Ms. Reyes in Puerto Rico. The next day, November 17, he flew Alluis to Curacao, from where Alluis returned by commercial air to Puerto Rico. Alluis spent the night of the seventeenth in Puerto Rico, at Thornburg's house, and after 10 or 11 a.m. of the eighteenth went to the San Juan airport and flew to New York. He said that the object of his trip was to celebrate with his wife their wedding anniversary (November 22); and hotel invoices show that Alluis was at the Plaza Hotel during the night of the eighteenth. However, he abruptly returned to Puerto Rico the next day, having, he testified, received a phone call from Thornburg's son, Brad. Brad supposedly expressed concern over his father. He had received no word from him and feared that Thornburg may have crashed at sea.

Upon returning to Puerto Rico, Alluis encountered Thornburg, safe and hale, that evening. Nonetheless,

he did not return to New York but on the next day, the twentieth, flew with Thornburg to St. Martin in the rented Cherokee. En route they supposedly searched for the missing Sun Islander. At St. Martin, they went to Eme's restaurant, Thornburg having learned that he could obtain information about the stolen Sun Islander from the owner of a "Cigarette" boat who had gone to Puerto Rico. Nothing developed from the first visit, and because of the mental condition of his wife, Thornburg had to leave St. Martin. Alluis alone made a second trip to Eme's bar on November 21. This time he learned from Francoise Eme's hotel telephone number in San Juan. It was this that supposedly led him back to San Juan and to the attempted meeting with Eme at La Rada Hotel.

Thornburg's account was as follows: He searched for the Sun Islander early in November in a plane borrowed from the St. Martin Aero Club. He also made inquiries in the French section of St. Martin and while doing so met Eme on November 4. (He testified to being told that the Sun Islander was seen as recently as October 27 near Eme's restaurant.) On November 5, Thornburg flew from Puerto Rico to St. Martin to return the Aero Club plane. On the afternoon of the fifth he flew with his wife to New York. They stayed at the Plaza Hotel through November 8, and at a friend's New York house on November 9, flying back to Puerto Rico the evening of the ninth. The next day, November 10, Thornburg and his son went to a garage in San Juan to see about shock absorbers for Thornburg's car, and at noon Thornburg was examined by a doctor in connection with his pilot's license. Thornburg expressly denied seeing Eme at any time from November 6-10. In the afternoon of the tenth, Thornburg approached

Ms. Reyes about rental of the Cherokee airplane. He preferred a low wing airplane because it was safer over water and he had never flown a high wing aircraft. On the afternoon of the eleventh, Thornburg, his wife and two daughters flew commercially to Curacao. He did so because of word from Alluis that the missing boat had been spotted in Colombia. Alluis could not locate a plane in Cartagena, and had suggested that Thornburg might rent one in Curacao.

Thornburg returned to Puerto Rico from Curacao late the thirteenth. He immediately set about getting the Cherokee equipped with an ADF. This was accomplished the next day, the fourteenth, and Thornburg checked out the plane and paid for it then. He departed San Juan early the fifteenth, landing at St. Martin. Then he flew the Cherokee to Curacao, arriving in late afternoon after flying over Antigua, Monserrat, and other islands. His wife and daughters were there to meet him. On the sixteenth he flew all the way up the Colombia coast to Cartagena. He overflew the boat which Alluis thought was the Sun Islander, and determined that it was another boat. On November 17, after meeting up with Alluis, Thornburg flew with Alluis back to Curacao, searching as they went.

Thornburg himself then flew on to St. Martin arriving, he said, after sundown on the seventeenth. En route he overflew Saba. Meanwhile his wife and two daughters flew commercially from Curacao to St. Martin. On the eighteenth, Thornburg, his wife and two daughters flew from St. Martin to Antigua, and back again to St. Martin. On the nineteenth they flew to Puerto Rico.

Alluis testified that Thornburg furnished his travel expenses in connection with searching for the Sun Is-

lander. From Thornburg's testimony, the jury could have concluded that except for a very limited and dwindling inheritance, he had no regular source of funds. His business did not appear to be productive. Thornburg testified that the Sun Islander was insured but that the insurer turned out to be a bogus company.

After his interrogation by the customs agents on November 22, Alluis left Puerto Rico and soon returned to Vietnam.

Denial of Motions for Acquittal

Both defendants assert error in the district court's failure to grant their motions for judgments of acquittal. Fed. R. Crim. P. 29. Viewing the evidence in the light most favorable to the Government, we can find no error. *Glasser v. United States,* 315 U.S. 60, 80 (1942).

We first consider the case against Alluis. Alluis denied knowing the Government's principal witness, Eme. However, Eme testified that Alluis was present on November 15 when Thornburg said that he was going to Colombia to obtain marijuana and asked Eme to procure a boat to transport it to Puerto Rico. Eme further testified that Thornburg told him to deliver the six suitcases of marijuana on board the Samanna to Alluis upon arrival in Puerto Rico, and that Alluis would pay him. Several days earlier, Eme testified, both Thornburg and Alluis had picked up from him another four suitcases which he had stored for them and paid him $1200 for their safekeeping. The jury could infer that these four suitcases had also held marijuana. *See infra.*

Eme's testimony did not stand alone. One of the suitcases found on the Samanna was tagged with Alluis' name. There was uncontradicted evidence of Alluis' note and early morning visit to Eme at the Hotel La Rada. There was testimony that Alluis beat a hasty retreat when Eme made a warning gesture. The wording of "Alluis' note to "Daniel" (signed "Roger"), and Alluis' acceptance of the phone calls for Eme from St. Martin on the night before suggest that Alluis and Eme were not, as Alluis testified, utter strangers. Alluis' itinerary, beginning with a trip to Colombia and Curacao in October before the Sun Islander disappeared, might have seemed to the jury more in keeping with the alleged smuggling venture than with a search for Thornburg's vessel. Alluis' comings and goings coordinated remarkably with the voyage of the Samanna. Alluis travelled from Curacao to Puerto Rico on the seventeenth, remaining until the eighteenth, the day the Samanna was due. Alluis went to New York when Eme's failure to appear might have caused grave concern. Alluis returned abruptly, ignoring a supposed anniversary celebration, in time to join Thornburg, fly to St. Martin and seek information at Eme's restaurant. And Alluis reappeared on Eme's doorstep in Puerto Rico right after learning that Eme was staying at the La Rada Hotel. A jury could doubt that coincidence accounted for such flawless timing.[4]

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[4]As Judge Friendly said in *United States v. Geaney,* 417 F.2d 1116, 1121 (2d Cir. 1969), *cert. denied, sub nom. United States v. Lynch,* 397 U.S. 1028 (1970).

> "It is true that almost every one of these items is susceptible of an explanation other than Geaney's participation in the conspiracy. However, pieces of evidence must be viewed not in isolation but in conjunction . . . As said . . . 'each of the * * * episodes gained color from each of the others'."

Alluis made, it is true, two telling points: first, that he and Thornburg had notified the authorities of the loss of the Sun Islander well before the smuggling venture involving Eme and the Samanna; second, that the entrance and exit stamps in Alluis' travel documents, and several airline tickets, tend to verify that he was in Colombia or Curacao between November 6 and 17. But we cannot say that either point is so compelling as to render insupportable the verdict against Alluis. The jury could have believed that Vargas did, in fact steal the boat or at least that it disappeared—with or without the defendants' connivance. Reporting Sun Islander stolen might have seemed like a good way to settle scores with a confederate while providing a cover for both past and future activities. Given the suggestion in the evidence that Vargas had ties with Santo Domingo and was experienced in Puerto Rican and Virgin Island waters, it is singular that the alleged search should have focused on Colombia, in the opposite direction. And Alluis' entry into Colombia and Curacao even before the Sun Islander disappeared casts further doubt upon the search alibi. As for the entry and exit stamps, they do not necessarily establish that Alluis could not have made one or two visits to St. Martin between the dates in question. Alluis, fluent in Spanish and French, was no stranger to the intricacies of travel.[5] There was testimony that Alluis held a second, tourist, passport (although Alluis testified he had left it in Vietnam).

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[5]Suggestive of the ease with which defendants could move about is Alluis' testimony of a hop to St. Barts and back on November 4. Thornburg piloted them over in a borrowed light plane and they picked up an early morning return ride back on a fishing boat. This is not to suggest that a trip from Colombia to St. Martin would be as easy.

Forged travel documents are not unknown, nor are friendly officials who do not require or do not stamp travel documents. Except for the inconclusive documents and tickets, there was nothing beyond defendants' testimony to verify Alluis' unbroken presence outside St. Martin. We cannot say that a jury, given all the evidence, could not be persuaded that Alluis had somehow made his way to St. Martin during this period. There was no error in denying Alluis motion for a judgment of acquittal.

We turn next to the sufficiency of the case against Thornburg. Thornburg argues that the "chain of evidence" was broken because Samanna was untended for more than 20 hours after its arrival at Boca de Congrejos. Yet Eme identified the six suitcases with marijuana which the agents found in Samanna's locked cabin as ones given him by Thornburg in St. Martin. It was for the jury to decide whether to credit Eme's testimony. If it did, it was entitled to link Thornburg with the seized evidence.

Looking at the evidence against Thornburg more broadly it consisted of Eme's testimony and such corroborating details as the presence of the marijuana on Samanna, Eme's selection of Thornburg's picture, and the timing of Thornburg's activities. The timing of Thornburg's movements fits, in large measure, with Eme's story. For example, Thornburg testified that he flew to St. Martin on the fifteenth, to Colombia on the sixteenth and was in St. Martin late on the seventeenth. These dates compare with Eme's testimony that on the fifteenth Thornburg said he was going to get marijuana in Colombia, and on the seventeenth or early eighteenth delivered it to Eme in St. Martin. Thornburg introduced a Plaza Hotel bill to show that he was with his

wife in New York from the fifth through the eighth, thus rendering impossible a meeting with Eme on the eighth. On one of these days, however, he could have returned by himself to St. Martin, and in light of all the evidence we cannot say that the jury had to disbelieve the substance of Eme's testimony.

There is also the fact of Alluis' association with Thornburg. Whether smuggling or looking innocently for Thornburg's boat, it is unquestioned that they were acting in concert during this period. Thornburg, according to Alluis, paid for his expenses to Colombia and for the "search." If Alluis was smuggling and not looking for the boat, it is hard to see how Thornburg could have been doing the opposite. Moreover, Thornburg, a resident of Puerto Rico, could have recruited Alluis during his visit to Syracuse in the fall, but Alluis, a newcomer, could scarcely have embarked on a Caribbean smuggling career by himself. Nor is it easy to see how he could have transported marijuana from Colombia without Thornburg's aid. Thus Alluis' visit to Eme at the La Rada Hotel and the other events which, apart from Eme's testimony, point to Alluis' guilt, tend also to buttress the Government's case against Thornburg.

Thornburg argues that he cannot be convicted upon Eme's uncorroborated "admissions," and that there was no "direct evidence that Thornburg delivered marijuana to Eme." But Thornburg mislabels Eme's testimony when he calls it all "admissions" and "hearsay." In relating Thornburg's statements on the fifteenth that he was going to procure marijuana in Colombia and that Eme was to get a boat, Eme was testifying, first hand, to statements constituting part of the charged conspiracy—not to after-the-fact admissions. Similarly, Eme's description of Thornburg's driving up in a red Toyota and delivering the six suitcases at dockside and of his accompanying instructions was "direct" testimony of actions forming part both of the conspiracy and of the crime of importation. C. McCormick, Law of Evidence § 228 (1954 ed.); J. Wigmore, Evidence § 1770 (3d ed.). Cases relating to uncorroborated admissions and confessions are beside the point. Eme's testimony, even uncorroborated, would, in terms of bare legal sufficiency, have been enough to support Thornburg's conviction.[6] *United States v. Miceli*, 446 F.2d 256 (1st Cir. 1971). An acquittal must be directed only if an accomplice's uncorroborated testimony is "incredible or insubstantial on its face." *United States v. Strauss*, 443 F.2d 986, 991 (1st Cir. 1971).

Thornburg points to discrepancies: for example, Agent Caldron's initial tip was that a boat was stolen at 1:00 in the morning of November *17* and was reportedly en route to St. Kitts to pick up marijuana. Like other discrepancies this one was for the jury to weigh. It might have concluded that whoever spoke of November 17 meant the eighteenth—an easy slip when talking about occurrences at 1 a.m. Thornburg questions other similar disparities. None were of such significance as to invalidate the verdict. Indeed, Thornburg is mistaken as to some: Alluis *was* in Puerto Rico

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[6]Defendants' counsel vigorously pointed out to the jury Eme's criminal background, and the benefits which might induce him to testify falsely. The court charged that while the jury could convict on the uncorroborated testimony of an accomplice, such testimony "is always to be received with caution and weighed with great care", and, to be sufficient to convict, must be believed beyond a reasonable doubt. The instruction was correct. *See, e.g., United States v. Ploof*, 464 F.2d 116 (2d Cir. 1972). A cautionary instruction along these lines was very much in order. *See McMillen v. United Staes*, 386 F.2d 29 (1st Cir. 1967).

on the morning of the eighteenth when Eme was supposedly due to arrive; there was evidence in support of a finding that the marijuana was from Colombia—Eme's testimony that Thornburg said he would get it there. Eme was questioned about whether he got the marijuana at St. Kitts. He denied so doing. It was for the jury to decide whether or not to believe him.

We conclude that the verdict was adequately supported, and that Thornburg's motion for a judgment of acquittal was properly denied.

Admissibility of Prior Marijuana Transaction

Both defendants complain of the court's allowing Eme to describe how he received four other suitcases from Thornburg and Alluis around November 8, stored them in an unoccupied hotel in St. Martin called Belle Creole, and returned them to Thornburg and Alluis on November 10. The next day Thornburg supposedly paid him $1200 for keeping them. Eme, when asked how he was sure of getting paid for transporting the marijuana on Samanna, referred to this prior transaction as a reason for confidence in defendants. From all this, the jury unquestionably gathered that the four suitcases had held marijuana, not clothing. But there was no abuse of discretion in allowing the testimony. Not only was it relevant to explain Eme's responses, but for Alluis and Thornburg to be in possession of four suitcases of marijuana in St. Martin just a few days before loading six suitcases on the Samanna tended to show a common scheme and purpose which the jury could consider in determining their guilt or innocence of the crimes charged. *See United States v. Hopkinson,* 492 F.2d 1041, 1043 (1st Cir. 1974); *Green v. United States,* 176 F.2d 541, 543 (1st Cir. 1949).

Admissibility of Thornburg's Alleged Statements Recounted by Eme

Alluis and, with less reason, Thornburg assert error in the admission of Eme's testimony of Thornburg's purported statements, especially those on the fifteenth, seventeenth and eighteenth, in St. Martin. These include Thornburg's saying that he was going to Colombia to get marijuana; his instructions to Eme to ready a boat; his announcemet on the seventh that he had the marijuana; and later, when loading the six suitcases on Samanna, his instructions to Eme to deliver them to Alluis in Puerto Rico.

Before turning to Alluis' more substantial objections, we deal briefly with Thornburg's. Thornburg, as already mentioned, mischaracterizes Eme's testimony concerning his (Thornburg's) remarks by calling it "hearsay." Against Thornburg himself, testimony of his criminal remarks and acts is anything but hearsay.[7] And while Eme was, of course, a "coconspirator," his live testimony at the trial did not have to be validated under any hearsay exception such as the one which allows use of a conspirator's out-of-court declarations against a fellow conspirator. That rule would apply only had there been an attempt to introduce against Thornburg out-of-court statements by Eme made during the conspiracy. *See Lutwak v. United States,* 344 U.S. 604 (1952); *United States v. Geaney, supra,* 417 F.2d at 1120 n. 3. A conspirator, like anyone else, is free to describe in open court, where he is subject to cross-

[7]With respect to the substantive offenses, such as the charge of importation, some of Thornburg's remarks (such as his statement that he was going to Colombia) might be hearsay, but it would be admissible under the exception for an accused's manifestation of design and plan. J. Wigmore, Evidence § 1732 (3d ed.).

examination, the relevant deeds and statements of a fellow conspirator. The question becomes one of credibility, which is for the jury.

It is when we turn to the use against Alluis of Thornburg's alleged statements that a hearsay problem arises. Certain of Thornburg's statements—though not those on November 15—were made outside Alluis' presence, including the purported instructions to Eme to deliver the marijuana to Alluis in Puerto Rico. If admissible at all against Alluis, these declarations would have to qualify under the hearsay exception allowing the declarations of one conspirator in furtherance of the objects of a conspiracy to be used against a coconspirator. *Glasser v. United States,* 315 U.S. 60, 74 (1941); *United States v. Johnson,* 467 F.2d 804 (1st Cir. 1972). There are limitations built into this rule, one of which is that there must be independent proof that the absent conspirator against whom the declarations are used was, in fact, connected with the conspiracy (and that there was a conspiracy). *United States v. Johnson, supra.*

Here there is no question of the sufficiency of the evidence *aliunde* of a conspiracy. There was the seizure of Eme and the boat loaded with marijuana. There was evidence that Eme was accompanied by James, and Eme's testimony that the marijuana was delivered and placed aboard by Thornburg in St. Martin.

On the question of Alluis' connection with the conspiracy the evidence *aliunde,* though less vivid, is nonetheless persuasive and adequate. We said in *Johnson, id.* at 866,

> "The independent evidence need not establish the alleged co-conspirator's participation beyond a reasonable doubt. Such statements are admissible if the trial court finds the independent evidence credible and sufficient to support a finding of concerted action."

Cf. United States v. Geaney, supra at 1120; *United States v. Oliva,* 497 F.2d 130 (5th Cir. 1974). Eme testified that Alluis was with Thornburg in St. Martin on several occasions, including on the fifteenth when Thornburg and Eme discussed plans to procure marijuana and transport it to Puerto Rico by boat. Alluis denied this and denied knowing Eme prior to going to the La Rada Hotel. But the jury believed Eme and could infer guilt. That Alluis' presence was not innocent could also be inferred from other factors, including that, according to Eme, Alluis and Thornburg had left in his keeping the four other suitcases. We have earlier detailed the extent to which Alluis' itinerary and timing, and his close association with Thornburg, indicated circumstantially his involvement. If there was a conspiracy and Thornburg was part of it, Alluis' constant and abnormal involvement with Thornburg during this time points to his connection. Both men relied on the alibi of the search for the boat to explain their travels. If one was not searching, it is unlikely the other was. Alluis' expenses for much of his extraordinary travel to Colombia and elsewhere were paid for by Thornburg. To cap it off, there was the tagged suitcase, Alluis' visit to the La Rada Hotel, his attempted flight and his note to Eme. Plainly Eme was to deliver the marijuana to someone, and Alluis' note and fortuitous arrival tended to show that he was the individual. We find sufficient credible evidence *aliunde* Thornburg's hearsay declarations to support a finding of Alluis' involvement.

In *United States v. Honneus,* 508 F.2d 566, 576-77 (1st Cir. 1974) we held that courts, whether or not requested by counsel, should deliver cautionary limiting instructions on the uses of coconspirators' hearsay declarations *either prior to the introduction of any evidence or immediately upon the first instance of such hearsay testimony.* The court should not await the end of the trial. We did not find plain error in *Honneus,* because the effect of the court's failure to instruct early in the trial did not seem critical in that case. Moreover, no previous case in the circuit had established that without adequate request it would be an error not to charge at an early stage. But we made clear, and we reiterate, our intention to deal differently with cases tried post-*Honneus.*

In the present case, which was tried well before our *Honneus* decision, Eme's testimony of instructions from Thornburg to deliver to Alluis was the only evidence specifically assigning to Alluis a role in the conspiracy. On the other hand, there was no question of Alluis' close connection with Thornburg and of their more or less continuous joint activity, and Eme testified that Alluis was present when the conspiracy was discussed. In addition, Alluis' meeting with Eme at the Hotel La Rada was the most dramatic evidence in the case against either defendant other than Eme's own testimony. Eme's testimony concerning Thornburg's alleged instructions came only after evidence had been put to the jury concerning these events. Given but two defendants and a prolonged trial focusing with utmost detail upon the involvement of each, we do not believe that the court's failure to instruct preliminarily was prejudicial.

Two complete sets of instructions were rendered by the court at the conclusion of the trial, in each of which the law on this issue was carefully and correctly set forth.

Motions for Severance

Both Alluis and Thornburg assert error in the district court's denial of their motions for severance. We find no error. As both were charged with having participated in the same offenses, they could be indicted together, Fed. R. Crim. P. 8(b), and tried together, Fed. R. Crim. P. 13, except, of course, they would be entitled to a severance for demonstrable prejudice. Fed. R. Crim. P. 14. *See United States v. Martinez,* 479 F.2d 824 (1st Cir. 1973); *United States v. King,* 355 F.2d 700 (1st Cir. 1966). Prejudice means more than just a better chance of acquittal at a separate trial. *United States v. Martinez, supra,* 828. Prejudice is ordinarily only a serious issue when evidence admissible against one defendant is potentially damaging yet inadmissible as to another, or where the defenses are highly inconsistent. *See, e.g., United States v. Clayton,* 450 F.2d 16 (1st Cir. 1971); *Flores v. United States,* 379 F.2d 905 (5th Cir. 1967). The present case did not involve problems of this sort. Most, if not all, of the Government's evidence was admissible as to both men, and the defense evidence wss mutually reinforcing.

Alluis points to *United States v. Bruton,* 391 U.S. 193 (1968), and similar cases, arguing prejudice from Eme's testimony of Thornburg's remarks. He likens both to the confessions of one defendant that are inadmissible against another. But as has been pointed out, if the jury found that a conspiracy existed and that Alluis was a member, Thornburg's remarks would be

admissible against Alluis as well as Thornburg under an exception to the hearsay rule. They were not, therefore, grounds for a severance.

Thornburg's severance claim is on a different theory. He argues that the case against Alluis was stronger than against himself (by reason of Alluis' appearance at the La Rada Hotel). However, even had there been a severance, the evidence of Alluis' action at the La Rada Hotel would have been admissible to prove the conspiracy to which Thornburg allegedly belonged.

We find no error in the denial of the motions for severance filed by each defendant.

Lack of Alibi Instruction

Both Thornburg and Alluis complain that their requests for an instruction on alibi were denied. Essentially they wanted the court to emphasize that when a defendant asserts an alibi, the burden does not shift to him to prove it. But the court made this point sufficiently clear in its instructions. It instructed several times that the burden was always upon the prosecution to prove guilt as to every element of the offense beyond a reasonable doubt, and that no burden or duty of producing evidence was ever upon the defendant. While one federal court, perhaps relying upon Pennsylvania law, has held that an alibi instruction of the type sought must be given, *United States v. Marcus*, 166 F.2d 497 (3d Cir. 1948), most cases where such instructions are in issue seem to have involved either confusing instructions by the trial judge that needed correction or else discredited state rules placing on the defendant the burden to establish alibi affirmatively. *See, e.g., United States v. Booz*, 451 F.2d 719 (3d Cir. 1971); *Stump v. Bennett*, 398 F.2d 111, 114

(8th Cir.), *cert. denied*, 393 U.S. 1001 (1968); *United States v. Carter*, 433 F.2d 874 (10th Cir. 1970). Traditional alibi instructions were likely to be hostile to an accused. *See Sullivan v. Scafati*, 428 F.2d 1023 (1st Cir. 1970) (upholding caution to the jury against too ready acceptance of an alibi). We do not recognize any generalized rule requiring an alibi instruction of the type sought, so long as it is made entirely clear that the burden of proof remains at all times with the prosecution. *Guthrie v. United States*, 207 F.2d 19 (D.C. Cir. 1953); *See United States v. Erlenbaugh*, 452 F.2d 967, 975 (7th Cir. 1971), *aff'd.*, 409 U.S. 239 (1972). We do not say, of course, that there may not be special occasions where such an instruction should be given. Here, however, while the facts were complicated, the issues were not, and we see no likelihood that the jury mistook the standard of proof. The court doubtless refused the charge in order to avoid complicating its instructions, which were accurate, lucid and complete.

Defects in the Indictment

While we understand that the minutes of proceedings before the grand jury are now recorded in the District of Puerto Rico, they were not ordinarily so recorded prior to 1974 when these indictments were returned. The older practice was undesirable but not unconstitutional nor contrary to announced circuit policy. *Schlinsky v. United States*, 379 F.2d 735 (1st Cir.), *cert. denied*, 389 U.S. 920 (1967). There is accordingly no merit in appellants' claim based on the lack of a grand jury transcript.

Appellants also object to the fact, not denied by the Government, that only agent Calderon appeared

before the grand jury. While Calderon had personally participated in the apprehension of Eme and Alluis, and had taken statements from Eme inculpating both defendants, he could testify personally to only part of the Government's case, which depended heavily upon Eme. Eme is said to have been available in a Puerto Rico jail while the grand jury was in session.

In *United States v. Jett,* 491 F.2d 1078, 1081-82 (1st Cir. 1974), we sustained an indictment obtained upon the testimony of a government agent reading another's notes. It had been fully explained to the grand jury that the testifying agent did not have first-hand knowledge. Here we do not know what was said to the grand jury, but there is no reason to believe that Calderon misrepresented the extent of his first-hand knowledge. *Cf. United States v. Estepa,* 471 F.2d 1132 (2d Cir. 1972). Bypassing a key available witness is not a practice which we encourage. Still the issue appellants argue is no different from that decided in *Costello v. United States,* 350 U.S. 359 (1956), and by ourselves in *Jett.* There is no evidence that Eme might have exculpated the defendants or that he was withheld for unacceptable motives Thornburg points to certain variances between Eme's statements and his testimony, but none of the sort likely to have led the grand jury not to indict.

Identification

Appellants argue that there should have been more reliable identification procedures to ensure that Eme

really knew the defendants. But the issue at the trial was not identification as such. Thornburg testified to having met Eme in connection with the Sun Islander search on November 5 in St. Martin, Thus under either Eme's or Thornburg's version, Eme would have been able later to pick out Thornburg's photograph: he would have known what Thornburg looked like. Alluis met Eme, at very least, by the time he came to the Hotel La Rada on November 22. Thus he too was known by sight to Eme during the investigative stage. Cases such as *United States v. Wade,* 388 U.S. 218 (1966), are inapposite. What appellants term an identification question was simply a question of Eme's credibility, not of his physical ability to identify either of the appellants.

Brady and Other Issues

Appellants contend that they were not furnished with all evidence favorable to them at an early enough time, and make objection to the lack of fairness of their trial and the Government's procedures. We have considered these arguments and find them to be without merit. Insofar as the record discloses, they were ably and vigorously represented. The trial took place for over a month, and it appears that prosecution documents, if not earlier revealed, were in the hands of the defense when there was still adequate time to meet them. Requests for additional time to call further defense witnesses or obtain further evidence do not appear.

We agree with the Government that there was no error in the court's failure to instruct that Gerritts, the man who tipped off agent Calderon that Samanna was stolen, could be presumed to be a witness unfavorable to the Government because he was not called. It was never clear that Gerritts could testify to any relevant matters of his own knowledge. He appears to have been a conduit for certain types of information all of which may have been second and third hand. His nonappearance would seem to prove nothing by itself. Appellants' remaining arguments we likewise find to be without merit.

Thornburg's Sentence

Thornburg argues that his sentence is excessive. It was, however, within legal limits and we are without authority to review the sentencing court's discretion. *Dorszynski v. United States,* 418 U.S. 424 (1974); *United States v. Foss,* 501 F.2d 522, 527 (1st Cir. 1974). The court's remark—to the effect that defendants' involvement in a coastwise method of shipping 227 pounds of marijuana might have gone on to an even worse drug such as cocaine or heroin—was not, in context, so unreasonable an assertion as to render the sentence invalid.

Conspiracy Sentences

In *Honneus, supra,* 508 F.2d at 569, we held that the Government could not impose multiple punishments for the same conspiracy. In the instant case Alluis and Thornburg were sentenced on both of the

conspiracy counts (counts 1 and 3) on which they were convicted. While the events comprising the conspiracy to import were detailed differently from those charged in the count covering conspiracy to possess, and while the time periods were somewhat different, the evidence was identical as to both and we can see no basis for concluding that there were separate conspiracies. Accordingly, we vacate the sentences under said counts and, in the cases both of Alluis and Thornburg, remand for resentencing in each case upon either one of the two conspiracy counts. The remaining conspiracy count is to be dismissed. We find no illegality as to the sentence upon the substantive importation count (count 2) in either case. Except with respect to resentencing as aforesaid upon only one of the two conspiracy counts in each case, we affirm the judgments of the district court.

So ordered.

APPENDIX B.

Order Extending Time to File Petition for Writ of Certiorari.

Supreme Court of the United States.

Thomas Thornburg, Petitioner, v. United States. No. A-161.

Upon Consideration of the application of counsel for petitioner(s),

It is Ordered that the time for filing a petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including September 20, 1975.

/s/ William J. Brennan, Jr.
Associate Justice of the
Supreme Court of the United States

Dated this 21st day of August, 1975.

APPENDIX C.

Affidavit of Richard A. Grossman.

In the Supreme Court of the United States, October Term, 1975.

Thomas Thornburg, Petitioner, vs. United States of America, Respondents.

I, RICHARD A. GROSSMAN, state as follows:

1. I am a member of the bar of this Court and counsel for Petitioner in the instant Petition.

2. I was first retained by Petitioner on August 20, 1975. On or about August 30, 1975, I received for the first time a partial Reporter's Transcript of the trial below. A review of the Transcript disclosed that in the midst of the jury's deliberation, it requested certain evidentiary material and instructions from the court. These requests were in Spanish. The court's response to the jury's inquiry was also in Spanish. Notwithstanding the fact that the trial of Petitioner was held in the United States District Court in Puerto Rico, this practice appeared disquieting.

It seemed to me that in view of this practice, the possibility existed that the trial of this rather complex matter may have been fraught with language problems on the part of the jury. Other than the Spanish communications between the court and jury, there was nothing in the record to disclose any language problem. Proceeding on no more than a "hunch"

or feeling about the problem, I journeyed to the United States District Court in Puerto Rico and asked to review the United States District Court jury questionnaires that were sent to and answered by each member of Petitioner's jury.

3. On Thursday, September 11, 1975, a review of these questionnaires disclosed for the first time that Juror No. 1, Carmen Rivera Flores, was disqualified from jury service because of insufficient knowledge of English. A review of the juror questionnaire of Alternate Juror Lopez Toro Fernando also disclosed his disqualification from jury service because of insufficient knowledge of English. Although not disqualified from jury service, Jurors Nos. 3 (Tomas Rivera) and 7 (Maria Luisa Camacho) disclosed in their respective responses to the questionnaire that they could read, write, speak and understand the English language only "a little bit" and "a little—not to (sic) much."

Dated: September 20, 1975.

RICHARD A. GROSSMAN

APPENDIX D.

Carmen M. Rivera Castro
620 Ardenas
Puerto Nuevo
Rio Piedras, P.R. 00920

xxxxx
17196

APR 1971

Enter name and address below if different from that shown at left. If same, enter word "SAME".

(Name)

(Street Address)

(City) (State) (Zip Code)

County SAN JUAN, P. R.

1. Date of birth AUGUST 11 1935
(Month) (day) (year)

2. Sex FEMALE

3. How long have you resided at the above address? 15 years and _____ months.

4. If the answer to Question 3 is less than 12 months, enter other places of residence within the past year.

_____ from _____ to _____
street city county state month, year month, year

_____ from _____ to _____
street city county state month, year month, year

5. Are you a citizen of the United States of America? Yes [x] No [ ]

6. Can you read, write, speak and understand the English language?
Yes [ ] No [x]

7. Do you have any physical or mental infirmity impairing your capacity to serve as a juror?
Yes [ ] No [x]

If so, describe it fully. _____

8. Have you ever been convicted of a State or Federal crime punishable by imprisonment for more than one year?
Yes [ ] No [x]

If your answer is yes, have your civil rights been restored by pardon or amnesty?
Yes [ ] No [ ]

9 Are any charges pending against you for the commission of a State or Federal crime punishable by imprisonment for more than one year?
Yes [ ] No [x]

10. Do you request excuse from jury service on the basis of any of the grounds listed on the attached sheet? Yes ☐ No ☒

If so, explain the ground of your claim. _____

11. Are you employed on a regular basis as

a full-time active member of the Armed Forces of the United States? Yes ☐ No ☐

a full-time member of a police force? Yes ☐ No ☐

a full-time employee of a public agency other than a court of the United States, the District of Columbia, a State, or any political subdivision thereof? Yes ☐ No ☐

a full-time officer or employee of the legislative branch or any agency or establishment of the legislative branch of the United States Government? Yes ☐ No ☐

a full-time member of the fire department or police force, or an officer or employee actively connected with the operation of a public communications system? Yes ☐ No ☐

782-3734 769-8827

a member of a State militia or National Guard? Yes ☒ No ☐

What is the nature of your occupation?

In considering this questionnaire, it is not necessary to answer the following two questions if you find answering them to be objectionable. They are sought in order to assure that there will be no discrimination in jury selection. If you have no objection, please answer the following:

15. Are you presently employed? Yes ☒ No ☐

Occupation or business SECRETARIAL

Business address EL COMANDANTE IND. DEV., CAROLINA, P. R.
(street) (city) (state) (zip code)

16. [redacted]

I swear or affirm that the foregoing statements are true to the best of my knowledge and belief.

Date: APRIL 1, 1971. X Tomas Rivera
Signature

SPACE FOR OFFICIAL USE ONLY

Check appropriate box if applicable:

☑ Disqualified ☐ Exempt ☐ Excused ☐ Excluded

Reasons:

NOT SUFFICIENT KNOWLEDGE OF ENGLISH

5403

May 20, 1969

AIRE
s) 5403

Tomas Rivera Santiago
Bo. Guaraguao
Guaynabo, P. R. 00657

RECEIVED
JUN 19 1969
CLERK'S OFFICE

Enter name and address below if different from that shown at left. If same, enter word "SAME".

Same
(Name)

Same
(Street Address)

Postal Address: Bzon 216 - Rufo Fajardo
Bayamón, Puerto Rico 00619
(City) (State) (Zip Code)

County Guaynabo, Puerto Rico

1. Date of birth Sept. 17 1927
(Month) (day) (year)

2. Sex M

3. How long have you resided at the above address? 3 years and 4 months.

4. If the answer to Question 3 is less than 12 months, enter other places of residence within the past year.

_____ from _____ to _____
street city county state month, year month, year

_____ from _____ to _____
street city county state month, year month, year

_____ from _____ to _____
street city county state month, year month, year

5. Are you a citizen of the United States of America? Yes ☒ No ☐

6. Can you read, write, speak and understand the English language? a little - not to much
Yes ☐ No ☐

7. Do you have any physical or mental infirmity impairing your capacity to serve as a juror?
Yes ☐ No ☒

If so, describe it fully. _____

8. Have you ever been convicted of a State or Federal crime punishable by imprisonment for more than one year?
Yes ☐ No ☒

If your answer is yes, have your civil rights been restored by pardon or amnesty?
Yes ☐ No ☐

9. Are any charges pending against you for the commission of a State or Federal crime punishable by imprisonment for more than one year?
Yes ☐ No ☒

10. Do you request excuse from jury service on the basis of any of the grounds listed on the attached sheet? Yes ☐ No ☒

If so, explain the ground of your claim. _____

11. Are you employed on a regular basis as:

a member in active service of Armed Forces of the United States? Yes ☐ No ☒

a member of any fire or police department? Yes ☐ No ☒

an elected official of the United States, State or local government who either is elected to public office or who is directly appointed by a person elected to public office? Yes ☐ No ☒

12. Telephone RESIDENCE — BUSINESS 723-0313

13. Are you married? Yes Yes ☒ No ☐

14. What is the extent of your education? 4th year of high School and Secretarial course.

In completing this questionnaire, it is not necessary to answer the following two questions if you find answering them to be objectionable. They are sought in order to assure that there will be no discrimination in jury selection. If you have no objection, please answer the following:

15. Are you presently employed? Yes ☒ No ☐

Occupation or business Auxiliar Fiscal IV - Negociado del Presupuesto

Business address Fortaleza #54 - San Juan, Puerto Rico
(street) (city) (zip code)

16. [redacted]

I swear or affirm that the foregoing statements are true to the best of my knowledge and belief.

Date: June 18, 1969

x Ramos Quiñones
Signature

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Check appropriate box if applicable:

☐ Disqualified ☐ Exempt ☐ Excused ☐ Excluded

Reasons:

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Jan 11 '73

ESTADO LIBRE ASOCIADO DE PUERTO RICO
OFICINA DEL GOBERNADOR
NEGOCIADO DEL PRESUPUESTO
FORTALEZA 54 — APARTADO 3228
SAN JUAN, PUERTO RICO 00904

10 de enero de 1973

Hon. Hiram R. Cancio
Juez Presidente de la Corte Federal
San Juan, Puerto Rico

Estimado señor Cancio:

El señor Tomás Rivera fue citado mediante telegrama para que compareciera a ese Tribunal el 30 de octubre de 1972 a prestar servicios como jurado. No obstante, como el señor Rivera trabaja en el Negociado del Presupuesto de la Oficina del Gobernador, tuvo que excusarse debido a que en esta Agencia se está trabajando en la preparación del documento de presupuesto que será sometido por el Gobernador a la consideración de la Asamblea Legislativa en su Sesión Ordinaria de 1973.

Mediante llamada telefónica originada ahí, se le comunicó al señor Rivera que debía comparecer hoy, miércoles 10 de enero de 1973, a las 9:30 A.M. para actuar como jurado en esa Corte.

Como el período de preparación del documento de presupuesto se prolongará hasta aproximadamente el 16 de febrero próximo, solicito respetuosamente se sirva conceder al señor Rivera una excusa temporera hasta esa fecha, cuando estará disponible para actuar como jurado cuando ese Honorable Tribunal lo estime necesario.

Cordialmente,

Jorge O'Neill
Director Interino

María Camacho Ramos
B1 Sta. Cruz
Bayamon P.R.

11736

June 4, 1970

IRE

11736

name and address below if
rent from that shown at left.
same, enter word "SAME".

Luisa Camacho Ramos
(Name)

"SAME"
(Street Address)

(State) (Zip Code)

County BAYAMON

1. Date of birth Julio (Month) 31 (day) 1926 (year)

2. Sex Female

3. How long have you resided at the above address? 11 years and _____ months.

4. If the answer to Question 3 is less than 12 months, enter other places of residence within the past year.

_____ from _____ to _____
street city county state month, year month, year

_____ from _____ to _____
street city county state month, year month, year

_____ from _____ to _____
street city county state month, year month, year

5. Are you a citizen of the United States of America? Yes [X] No [ ]

6. Can you read, write, speak and understand the English language? (a little bit)
Yes [ ] No [ ]

7. Do you have any physical or mental infirmity impairing your capacity to serve as a juror?
Yes [ ] No [No]

If so, describe it fully. _____

_____

8. Have you ever been convicted of a State or Federal crime punishable by imprisonment for more than one year?
Yes [ ] No [No]

If your answer is yes, have your civil rights been restored by pardon or amnesty?
Yes [ ] No [ ]

9. Are any charges pending against you for the commission of a State or Federal crime punishable by imprisonment for more than one year?
Yes [ ] No [No]

10. Do you request excuse from jury service on the basis of any of the grounds listed on the attached sheet? Yes ☐ No ☒ No

If so, explain the ground of your claim. _____

11. Are you employed on a regular basis as:

(a) a member in active service of Armed Forces of the United States? Yes ☐ No ☒ No

(b) a member of any fire or police department? Yes ☐ No ☒ No

(c) a public officer of the United States, State or local government who either is elected to public office or who is directly appointed by a person elected to public office? Yes ☐ No ☒ No

12. Telephone: RESIDENCE _____ BUSINESS _____

13. Are you married? Yes ☐ No ☒ No

14. What is the extent of your education?

In completing this questionnaire, it is not necessary to answer the following two questions if you find answering them to be objectionable. They are sought in order to assure that there will be no discrimination in jury selection. If you have no objection, please answer the following:

15. Are you presently employed? Yes ☒ X No ☐

Occupation or business Jefe, División de Compras

Business address Centro de Salud de Bayamón, Calle Dr. Rossy, Bayamón, P. R.
(street) (city) (zip code)

16. [redacted] _____

I swear or affirm that the foregoing statements are true to the best of my knowledge and belief.

Date 15 de junio de 1970. X Signature

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Check appropriate box if applicable:

☐ Disqualified ☐ Exempt ☐ Excused ☐ Excluded

Reasons:

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López Toro, Fernando
Quiñones St.
Naguabo, P.R. 00718

16629

NAIRE
rs) 16629

Enter name and address below if different from that shown at left. If same, enter word "SAME".

Lopez Toro Fernando
(Name)

Urb. Juan Mendoza, # 61
(Street Address)

Naguabo, Puerto Rico 00718
(City) (State) (Zip Code)

County Naguabo, Puerto Rico

1. Date of birth January (Month) 30 (day) 1928 (year)

2. Sex M

3. How long have you resided at the above address? 7 years and 00 months.

4. If the answer to Question 3 is less than 12 months, enter other places of residence within the past year.

_____ from _____ to _____
street city county state month, year month, year

_____ from _____ to _____
street city county state month, year month, year

_____ from _____ to _____
street city county state month, year month, year

5. Are you a citizen of the United States of America? Yes ☒ X No ☐

6. Can you read, write, speak and understand the English language?
Yes ☐ No ☒ X ?

7. Do you have any physical or mental infirmity impairing your capacity to serve as a juror?
Yes ☐ No ☒ X

If so, describe it fully. _____

8. Have you ever been convicted of a State or Federal crime punishable by imprisonment for more than one year?
Yes ☐ No ☒ X

If your answer is yes, have your civil rights been restored by pardon or amnesty?
Yes ☐ No ☐

...es pending against you for the commission of a State or Federal crime punishable by ...more than one year?
Yes ☐ No ☒ X

10. Do you request excuse from jury service on the basis of any of the grounds listed on the attached sheet? Yes [ ] No [X]

If so, explain the ground of your claim. _____

11. Are you employed on a regular basis as:

(1) a member in active service of Armed Forces of the United States? Yes [ ] No [X]

(2) a member of any fire or police department? Yes [ ] No [X]

(3) a public officer of the United States, State or local government who either is elected to public office or who is directly appointed by a person elected to public office? Yes [X] No [ ]

12. Telephone RESIDENCE _____ BUSINESS 874-2820

13. Are you married? Yes [X] No [ ]

14. What is the extent of your education?

In completing this questionnaire, it is not necessary to answer the following two questions if you find answering them to be objectionable. They are sought in order to assure that there will be no discrimination in jury selection. If you have no objection, please answer the following:

15. Are you presently employed? Autoridad de Las Fuentes Fluviales Yes [X] No [ ]

Occupation or business Encargado Local Sistema Electrico Naguabo

Business address Calle Quiñones #11 (street) Naguabo (city) Puerto Rico (state) (zip code)

16. [redacted] _____

I swear or affirm that the foregoing statements are true to the best of my knowledge and belief.

Date: 7 april 1971 X Fernando Luis Toro (Signature)

SPACE FOR OFFICIAL USE ONLY

Check appropriate box if applicable:

[X] Disqualified [ ] Exempt [ ] Excused [ ] Excluded

Reasons:

NOT SUFFICIENT
LISH

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APPENDIX E.

Court's Translation of Communications Between Judge and Jury.

"THE COURT: I see that the defendants are present and so are the attorneys and the U. S. Attorney. Gentlemen, I have received so far three notes from the jury, actually four. The first message I received contains two pages which I consider to be two requests and I would like for the deputy clerk to mark them Court Exhibits 1 and 2.

I received the third notice which should be marked by the Court as Court Exhibit 3. Those for 1 and 2 and this is 3.

MR. PEREZ: Your Honor, I believe those are in Spanish and I would like for the purity of the process to be translated.

THE COURT: They will be translated by the court. The fourth note I believe all the attorneys are aware of the contents of these notes.

MR. RIVERA: We are.

MR. PEREZ: The government is aware, Your Honor.

THE COURT: I will request that the deputy clerk return those notes to me. I would like to translate them to you for the purpose of the defendants.

MR. PEREZ: No objection from the government, sir.

THE COURT: I will try to do my best. I don't have an interpreter here. The Court Exhibit 1 is a note from the jury addressd to the Judge and I will translate to the best of my knowledge. "Please inform in the case of Roger Alluis the following questions and please

answer them with a yes or no. 1, Did Mr. Alluis leave for St. Thomas in the boat Sun Islander on October 30, 1972? 2, Did he fly the same date for St. Martin? 3, If Mr. Alluis and Mr. Thornburg fly together in the airplane that was leased by Mr. Thornburg in Isla Verde in Stop 10? 4, If in November 4th, if Mr. Thornburg and Mr. Alluis—" I am translating freely. Actually it says, "Whether they were in St. Martin or Puerto Rico? 5, If in November 5, he flew from Puerto Rico to Venezuela and Colombia? 6, If in November 13, they were together? That is Roger and Thomas in Curacao, if so—" I am sorry, "and if Roger Alluis returned that day to Colombia? 7, If Mr. Alluis returned on the 20th of November, 1972, to St. Martin and if he returned on the 21st of November, 1972, to Puerto Rico and 8, If on November 22, 1972, he was in La Rada Hotel and on the next day he was arrested."

Exhibit 2, Court's Exhibit 2, "Judge, please inform the jury if in the case of Thomas Thornburg you may answer the following questions with a yes or no. 1, If the papers from Sea-Land had the receipt date in relation to the car? If it had the car receipt date in Puerto Rico in order? 2, If Roger Alluis was together with Mr. Thornburg on the 14th of November? 3, If Mr. Thornburg was on 4th of November in St. Martin or Puerto Rico? 4, Did he lease another airplane in Curacao or in some other part, some other country, I imagine or some other section to make a search of the Sun Islander? 5, Did he declare the years in which he would take his family to Europe in space available?"

I issued an answer to these two requests which are in the possession of the members of the jury and I do

not remember the exact words. I would not venture to state for the record what the contents of that answer was, but as soon as they get back, I will answer for the record.

The third note, "Please, we need the transcript, the complete transcript of the testimony of Mr. Daniel Maurice Eme, Mr. Roger Alluis and Mr. Thomas Thornburg." I answered, I am referring now to Court's Exhibit 3, I answered that in a specific way which I will reflect for the record as soon as the members of the jury are back, Court Exhibit No. 4, "Honorable Judge, please provide us with a copy of your complete instructions to the jury or at least repeat to us verbally or in writing the corresponding parts to the different forms of possession."

. . . .

THE COURT: For the record, there is an answer to my second memorandum. There is an answer from them to my second memo to them. It says, "Your Honor, we have decided that it is not necessary that the statements be read to us. Thank you. Signed by Mr. Otero, Foreman of the Jury."

. . . .

THE COURT: Now, gentlemen, for the record, at 5:35 p.m. I answered the first two notes that came together with the notes that have been marked as Court's Exhibits 1 and 2 in the following manner: "Gentlemen of the jury—." Let us make reference for the record. These are the specific questions that were asked of the court in relation to Mr. Alluis and Mr. Thornburg and I answered in the following manner: "Gentlemen of the jury, I cannot answer any of your questions. The answers to your questions come out of

the evidence that was presented before you and it is you who have to arrive at your own conclusions." Signed Jose V. Toledo, Judge. "P.S., please keep this note and return it to the deputy clerk. . . ."

. . . .

THE COURT: It is now marked as Exhibit 5 for the Court. Now this will be marked as Exhibit 6. I am translating from Spanish.

. . . .

THE COURT: "The court cannot deliver to you the transcripts according to the law. What the court can do is to read to you in open court, the statements in open court of Messrs. Eme, Thornburg and Alluis. This nevertheless will take from two to three full days. Please inform me if in view of this information you feel that it is required to do so. Jose V. Toledo, Judge, P.S., please keep this note and return it to the deputy clerk."

This will be marked as Exhibit 5 for the Court—6, I am sorry. I have just received another notice. I will show it to the members of the jury—I think to the attorneys. It has nothing to do with the case . . ."

THE COURT: Gentlemen, the note that has brought us here, Exhibit No. 4, Court Exhibit No. 4, this is, "Honorable Judge, please provide us with a copy of your complete instructions or at lease repeat to us verbally or in writing the corresponding instructions referring to the different forms of the possession. Thank you, Cesar Otero, Jr.".

[R.T. 16th Day of Trial, September 26, 1973, p. 114, lines 13-23, p. 115, lines 9-25, p. 116, lines 1-25, p. 117, lines 1-5, p. 119, lines 18-22, p. 121, lines 9-21, p. 122, lines 17-19 and 23-25, p. 123, lines 1-17 and 19-24.]

Supreme Court, U. S.
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No. 75-470

In the Supreme Court of the United States

OCTOBER TERM, 1975

THOMAS THORNBURG, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

MEMORANDUM FOR THE UNITED STATES

ROBERT H. BORK,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

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THOMAS THORNBURG, PETITIONER

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

MEMORANDUM FOR THE UNITED STATES

Petitioner contends that he was deprived of a fair trial because the trial court refused to give a special instruction concerning the burden of proof when a defendant attempts to establish an alibi and because of the inability of one or more members of the jury to understand English.

Following a jury trial in the United States District Court for the District of Puerto Rico, petitioner and co-defendant Roger Alluis[1] were convicted of conspiring to import, of importing and of conspiring to possess a controlled substance (marijuana), in violation of 21 U.S.C. 960, 952(a)(2) and 846. Petitioner was sentenced to five years' imprisonment on count one, to be followed by two concurrent terms of three years' imprisonment on counts two and three, and by three concurrent terms of two years' special parole. The

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[1]The petition filed by co-defendant Alluis (No. 75-5311) was denied on November 11, 1975.

court of appeals affirmed, but vacated the sentences imposed on the two conspiracy counts and remanded for resentencing upon one of them and for dismissal of the other (Pet. App.).

The government's evidence, as outlined in the opinion of the court of appeals (Pet. App. 2-14), established the existence of a conspiracy to ship marijuana by speedboat from St. Martin in the French West Indies to Puerto Rico. One of the co-conspirators, Marcell Daniel Eme, pleaded guilty and testified at trial against petitioner and Alluis. Eme identified petitioner and Alluis as participants in the scheme to smuggle marijuana into Puerto Rico, and he described a series of meetings and trips in furtherance of the scheme (7 Tr. 1-54; 8 Tr. 2-42). Both petitioner and Alluis attempted to establish an alibi by testifying that during the 2 1/2 week period in question they were engaged in a search for a lost boat belonging to Thornburg (12 Tr. 100-194; 14 Tr. 44-72; 15 Tr. 1-10).

1. Petitioner contends that the trial court erred in refusing to give a special instruction concerning the burden of proof when a defendant attempts to establish an alibi. He argues that a special alibi instruction should have been given in the present case, despite the fact that the court instructed the jury several times that the burden of proof is always on the prosecution and that the defendant in a criminal case never has a burden or duty to produce evidence.

While one circuit has held that a defendant is entitled to an alibi instruction upon request, regardless of the adequacy of general instructions concerning the burden of proof (see *United States* v. *Booz*, 451 F.2d 719, 722-723 (C.A. 3)), the other circuits that have considered the issue, like the

court below, have refused to adopt a general rule.[2] We do not believe that a fixed and inflexible rule concerning the giving of a special alibi instruction is required by due process, although a court may of course decide to promulgate such a rule in the exercise of its supervisory powers. Neither do we believe that this is a matter meriting review by this Court, and the promulgation of a uniform national rule. On the facts of this case, moreover, we submit that the trial court properly refused to give a special alibi instruction. As the court of appeals stated (Pet. App. 27):

> We do not say, of course, that there may not be special occasions where such an instruction should be given. Here, however, while the facts were complicated, the issues were not, and we see no likelihood that the jury mistook the standard of proof. The court doubtless refused the charge in order to avoid complicating its instructions, which were accurate, lucid and complete.

2. During its deliberations, the jury sent several messages to the court in Spanish which the court answered in Spanish. On the basis of these communications, petitioner's counsel, retained subsequent to the decision by the court of appeals, reviewed the questionnaires that had been completed by the jurors to determine whether any members of the jury might have experienced language problems (Pet. App. C). The questionnaire completed by

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[2]See *Guthrie* v. *United States*, 207 F.2d 19 (C.A. D.C.); *United States* v. *Erlenbaugh*, 452 F.2d 967 (C.A. 7), affirmed, 409 U.S. 239.

Contrary to petitioner's contention, the holding in the present case does not conflict with decisions of the Eighth Circuit. The Eighth Circuit's decisions in *Johnson* v. *Bennett*, 414 F.2d 50, and *Stump* v. *Bennett*, 398 F.2d 111, certiorari denied, 393 U.S. 1001, relied upon by petitioner, instead invalidated the practice of requiring a defendant to prove his alibi by a preponderance of the evidence.

juror Carmen Rivera Flores indicates that she had been disqualified from jury service in 1971 due to insufficient knowledge of English. On a questionnaire completed in 1969, juror Tomas Rivera Santiago had stated that he could read, write, speak and understand the English language "a little—not to [sic] much." Juror Maria Camacho Ramos had stated in a 1970 questionnaire that she could read, write, speak, and understand English "a little bit" (Pet. App. D).

Petitioner contends, on the basis of these questionnaires, that he was deprived of a fair trial. Petitioner did not raise this issue in either the trial court or in the court of appeals, and normally should not be permitted to raise the issue for the first time in this Court. *Tacom* v. *Georgia*, 410 U.S. 351, 352; *Lawn* v. *United States*, 355 U.S. 339, 362 n. 16.

In view of the importance of the issue and of the difficulty of dealing with it on the basis of the present record, however, the Court might deem it appropriate to remand petitioner's case to the United States District Court for the District of Puerto Rico for a hearing limited to ascertaining whether any members of the jury experienced difficulty understanding the proceedings because they were conducted in English. Alternatively, the Court might appropriately deny the petition, leaving petitioner with the option of raising the issue in a collateral attack on his conviction under 28 U.S.C. 2255.[3]

Respectfully submitted.

ROBERT H. BORK,
Solicitor General.

DECEMBER 1975.

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[3]Since co-defendant Alluis' petition has been denied (see n. 1, *supra*), the only course available to him to raise the issue is a proceeding under Section 2255.